injury received by him in consequence of the carelessness of another while both are engaged in the same service, has its great example in *Farwell* v. *Boston, etc., R. R. Co.,* 4 Metc. 49, in which an engineer employed by the railroad company was injured by the negligence of the switch-tender and the company was held not liable. An important and universally accepted restriction of the fellow-servant rule is what is known as the "vice-principal limitation," a vice-principal being a servant who represents the master in the discharge of those personal or absolute duties which every master owes to his servant. The leading example of the vice-principal rule as established in the federal courts in the case of *Chicago, Milwaukee & St. Paul Railway Co.* v. *Ross,* 112 U. S. 377, the facts of which were that P., an engineer of a freight train, sustained injuries by collision with a gravel train through the negligence of the conductor of the freight train. It was held that the conductor was not a fellow servant with the fireman, the brakeman, the porters and the engineer, that he stood in the relation of vice-principal to the plaintiff, and that the company was liable. Justices BRADLEY, MATTHEWS, GRAY and BLATCHFORD dissented on the ground that the conductor was a fellow-servant with the other employes of the train. The case of *Baltimore and Ohio Railroad Co.* v. *Baugh,* 149 U. S. Rep. 368, marks the discarding of the so-called theory of vice-principal in the federal courts and the making the question whether the negligence charged is the neglect of a primary absolute duty of the master to the servant the essential one. The character of the act rather than the relation of the employes to each other is to be chiefly considered. In that case the company was held not liable for the injuries to the defendant, a fireman, through the negligence of the engineer of the locomotive. Mr. Justice FIELD dissented on the ground that the engineer was a vice-principal under the facts of the case, and that the company was liable. Mr. Chief Justice FULLER dissented on the ground that the rule laid down in *Chicago, Milwaukee & St. Paul Railway Co.* v. *Ross,* governed the case. In the present case Judge GRAY follows the reasoning of Justice BREWER in *Baltimore & Ohio Railway Co.* v. *Baugh,* and holds that there was an absolute and personal duty as shown from the character of the act upon the employer to explain the dangerous character of the act to the employe, and that the employer is not discharged by merely entrusting its performance to a subordinate.

MECHANICS' LIEN—LEASEHOLD ESTATE.—One Crutcher erected a building upon certain real property in which he had a leasehold estate. Plaintiff (defendant in error here) had purchased materials for the construction of this building, and, not being paid therefor, obtained a materialman's lien under the statute (§ 4817, WILSONS REV. & AM. ST. OKL., 1903), providing, "Any person who shall, under contract with the *owner* of any tract * * * of land * * * furnish material for the erection * * * of any building * * * shall have a lien upon the whole of said piece or tract of land, the building and appurtenances * * * for the amount due him for said labor, materials, etc." Defendant Crutcher objected that his interest in the land was insufficient to support a mechanic's lien. *Held,* that a leasehold

estate, if the building be erected within the authority conveyed by the lease, is sufficient title of ownership to authorize a mechanic's lien under the statute. *Crutcher et ux.* v. *Block* (1907), — Okla. —, 91 Pac. Rep. 895.

This case passes for the first time in Oklahoma upon the session in question of the Mechanic's Lien Law of 1903. The construction of the term "owner," as used in the statute, so as to include the holder of a leasehold estate in lands, is undoubtedly correct, and supported by the weight of authority. In those states in which the statute specifically uses the word "owner" a similar interpretation is adopted. *Hathaway* v. *Davis,* 32 Kans. 693, 5 Pac. 29; *Morgan* v. *Bloecker,* 6 Pa. Dist. R. 659; *Alley* v. *Lanier,* 41 Tenn. 540; *Leismann* v. *Lovely,* 45 Wis. 420. It is a well settled rule that a mechanic's lien may attach to and be enforced against a leasehold estate, even though the tenancy be only from month to month. 20 AM. & ENG. ENC. OF LAW, 303-4; *McCarty* v. *Burnet,* 84 Ind. 23; *Hathaway* v. *Davis,* 32 Kans. 693; *Forbes* v. *Mosquito Fleet Yacht Club,* 175 Mass. 432; *Peninsular General Electric Co.* v. *Norris,* 100 Mich. 496; *Daniel* v. *Weaver,* 73 Tenn. (5 Lea) 392. Some cases have gone so far as to hold that any interest which the owner of a building or improvement may have in the lot or land on which it is situated will support a mechanic's lien, if such interest be one that can be assigned or transferred or sold under execution. *Walker* v. *Daimwood,* 80 Ala. 245; *Jarvis* v. *State Bank,* 22 Colo. 309; *Garland* v. *Bear Lake, etc., Water Works, etc., Co.,* 9 Utah 350; *McGreary* v. *Osborne,* 9 Cal. 119; *Benjamin* v. *Wilson,* 34 Minn. 517.

PLEADING—ELECTION BETWEEN COUNTS.—In an action for drilling a well, plaintiff in one count sought a recovery on the ground of his performance of a written contract which he alleged was substantially modified by parol, and, in another count, a recovery on a quantum meruit. *Held,* the court erred in requiring him to elect on which count he would proceed. *Norbeck & Nicholson Co.* v. *Pease* (1907), — S. D. —, 112 N. W. Rep. 1136.

This is a case of first impression in South Dakota. HANEY, J. dissenting, maintains that as there was but a single cause of action stated, the lower court did not err in compelling the plaintiff to elect on which count he would proceed. The majority recognize the general principle that, under the Code, a single cause of action should be stated in a single count, but hold that, where the plaintiff is uncertain as to what the legal liability is, he may state the cause of action in different counts. In support of the majority opinion, see *Wilson* v. *Smith,* 61 Cal. 209; *Willard et al.* v. *Carrigan,* 8 Ariz. 70, 68 Pac. 538; *Oberndorfer* v. *Moyer,* 30 Utah, 325; *Leonard et al.* v. *Roberts,* 20 Colo. 88; *Rinard* v. *Omaha, Kansas City and Eastern R. R. Co.,* 164 Mo. 270, 64 S. W. 124; *Cawker City Bank* v. *Jennings,* 89 Ia. 230, 56 N. W. 494; *Armstrong* v. *Penn, Adm'r.,* 105 Ga. 229. But a tendency towards an opposite ruling is found in some states. A cause of action on contract cannot be joined with one setting up the same facts on quantum meruit. *Muzzy* v. *Ledlie,* 23 Wis 445. See also *Ferguson* v. *Gilbert,* 16 Ohio St. 88; *Wehmhoff* v. *Rutherford,* 98 Ky. 91; *Reed et al.* v. *Poindexter,* 16 Mont. 294; *Bassett* v. *Shares,* 63 Conn. 39, 27 Atl. 421; *Fox* v. *Graves,* 46 Neb. 812.